

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

11 WILLIE DWAYNE CLARK,
12 Plaintiff,
13 v.
14 ANDREW CIOLLI, et al.,
15 Defendants.

Case No. 1:21-cv-01081-SKO (PC)

**FINDINGS AND RECOMMENDATIONS
TO DISMISS THE ACTION FOR FAILURE
TO STATE A COGNIZABLE CLAIM FOR
RELIEF**

Clerk of the Court to Assign District Judge

17 Plaintiff Willie Dwayne Clark is proceeding *pro se* and *in forma pauperis* in this civil
18 action brought pursuant to 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of*
19 *Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Currently before the Court is Plaintiff's
20 complaint filed on July 12, 2021.

21 **I. SCREENING REQUIREMENT**

22 The Court is required to screen complaints brought by prisoners seeking relief against a
23 governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C. §
24 1915A(a). Plaintiff's complaint, or any portion thereof, is subject to dismissal if it is frivolous or
25 malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary
26 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2); 28 U.S.C.
27 § 1915(e)(2)(B)(ii).

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1 A complaint must contain “a short and plain statement of the claim showing that the
 2 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
 3 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
 4 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
 5 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken as
 6 true, courts “are not required to indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*,
 7 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks & citation omitted).

8 Prisoners proceeding *pro se* in civil rights actions are entitled to have their pleadings
 9 liberally construed and to have any doubt resolved in their favor. *Hebbe v. Pliler*, 627 F.3d 338,
 10 342 (9th Cir. 2010) (citations omitted). To survive screening, Plaintiff’s claims must be facially
 11 plausible, which requires sufficient factual detail to allow the Court to reasonably infer that each
 12 named defendant is liable for the misconduct alleged, *Iqbal*, 556 U.S. at 678 (quotation marks
 13 omitted); *Moss v. United States Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). The sheer
 14 possibility that a defendant acted unlawfully is not sufficient, and mere consistency with liability
 15 falls short of satisfying the plausibility standard. *Iqbal*, 556 U.S. at 678 (quotation marks
 16 omitted); *Moss*, 572 F.3d at 969.

17 **II. BIVENS ACTIONS FOLLOWING ZIGLAR V. ABASSI**

18 Based on the case *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971),
 19 courts have found that individuals may sue federal officials for damages for constitutional
 20 violations under certain circumstances. A *Bivens* action is the federal analog to suits brought
 21 against state officials under 42 U.S.C. § 1983. *Hartman v. Moore*, 547 U.S. 250 (2006). The basis
 22 of a *Bivens* action is some illegal or inappropriate conduct on the part of a federal official or agent
 23 that violates a clearly established constitutional right. *Baisier v. Department of Justice, Office of*
 24 *U.S. Trustee*, 327 F.3d 903, 909 (9th Cir. 2003). “To state a claim for relief under *Bivens*, a
 25 plaintiff must allege that a federal officer deprived him of his constitutional rights.” *Serra v.*
 26 *Lappin*, 600 F.3d 1191, 1200 (9th Cir. 2010) (citing *Scheatz v. United States*, 234 F.3d 428, 432
 27 (9th Cir. 2000). A *Bivens* claim is only available against officers in their individual capacities.
 28 *Morgan v. U.S.*, 323 F.3d 776, 780 n.3 (9th Cir. 2003); *Vaccaro v. Dobre*, 81 F.3d 854, 857 (9th

1 Cir. 1996). “A plaintiff must plead more than a merely negligent act by a federal official in order
 2 to state a colorable claim under *Bivens*.” *O’Neal v. Eu*, 866 F.2d 314, 314 (9th Cir. 1988).

3 Plaintiff is a federal prisoner proceeding under *Bivens*. To date, the Supreme Court has
 4 only recognized a *Bivens* remedy in the context of the Fourth, Fifth, and Eighth Amendments. *See*
 5 *Bivens*, 403 U.S. 388 (Fourth Amendment prohibition against unreasonable searches and
 6 seizures); *Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment gender-discrimination);
 7 *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment Cruel and Unusual Punishments
 8 Clause for failure to provide adequate medical treatment). The Supreme Court has recently made
 9 clear that “expanding the *Bivens* remedy is now a disfavored judicial activity,” and has
 10 “consistently refused to extend *Bivens* to any new context or new category of defendants. *Ziglar*
 11 *v. Abbasi*, — U.S. —, 137 S. Ct. 1843, 1857 (2017) (citations omitted); *Egbert v. Boule*, —
 12 U.S. —, 142 S. Ct. 1793, 1797 (2022) (The Court reiterated that “a cause of action under
 13 *Bivens* is ‘a disfavored judicial activity’”).

14 If a claim presents a new context in *Bivens*, the court must consider whether there are
 15 special factors counseling against extension of *Bivens* into this area. *Abassi*, 137 S. Ct. at 1857.
 16 The Supreme Court’s precedents “now make clear that a *Bivens* remedy will not be available if
 17 there are ‘special factors counselling hesitation in the absence of affirmative action by
 18 Congress.’” *Id.* Thus, “the inquiry must concentrate on whether the Judiciary is well suited,
 19 absent congressional action or instruction, to consider and weigh the costs and benefits of
 20 allowing a damages action to proceed.” *Id.* at 1857–58. This requires the court to assess the
 21 impact on governmental operations system-wide, including the burdens on government
 22 employees who are sued personally, as well as the projected costs and consequences to the
 23 government itself. *Id.* at 1858. In addition, “if there is an alternative remedial structure present in
 24 a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of
 25 action.” *Id.*

26 Traditionally, courts applied a two-part test to determine the appropriateness of extending
 27 a *Bivens* cause of action. First, the Court examined whether the claim arises in a “new context” or
 28 involves a “new category of defendants.” *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020).

1 Second, if the claim arises in a new context, the Court assessed whether there exists any “special
2 factors counselling hesitation in the absence of affirmative action by Congress.” *Abassi*, 137 S.
3 Ct. at 1857 (internal quotations omitted). The Supreme Court recently reformulated this test. In
4 *Egbert v. Boule*, 142 S. Ct. at 1803, the Supreme Court determined that these two steps can be
5 distilled to one single inquiry; that is, “whether there is any reason to think that Congress might
6 be better equipped to create a damages remedy.” Further, the Court specified that if there is even
7 one rational reason to defer to Congress to afford a remedy, then “a court may not recognize a
8 *Bivens* remedy.” *Id.* The Court concluded that a rational reason for deference to Congress will
9 exist “in most every case.” *Id.*

10 Finally, the presence of an alternative remedial structure counsels against extending
11 *Bivens* to a new cause of action. The Court may not even determine the adequacy of the
12 alternative remedy, as this is a task left to Congress. *Egbert v. Boule*, 142 S. Ct at 1807. Indeed,
13 “[s]o long as Congress or the Executive has created a remedial process that it finds sufficient to
14 secure an adequate level of deterrence, the courts cannot second-guess that calibration by
15 superimposing a *Bivens* remedy.” *Id.* This remains true “even if a court independently concludes
16 that the Government's procedures are ‘not as effective as an individual damages remedy.’” *Id.*
17 (quoting *Bush v. Lucas*, 462 U.S. 367, 372 (1983)).

18 III. PLAINTIFF'S ALLEGATIONS

19 Plaintiff's complaint names Warden Andrew Ciolli, Acting Captain Joshua Brown, Health
20 Services Administrator Christopher Hanson and “S.I.S. Technician” Moses Jimenez, who are all
21 employed at the United States Penitentiary in Atwater (USP Atwater), as defendants. (Doc. 1 at
22 2.)

23 In his first claim for relief, Plaintiff alleges a violation of his Eighth Amendment rights
24 and contends that on November 16, 2020, he was transferred to USP Atwater. Upon arrival,
25 Plaintiff was tested for COVID-19 and was notified 14 days later of the negative results. A
26 second test on or about November 30, 2020, also produced negative results. On December 9,
27 2020, following the two negative test results, Plaintiff was moved to a general population housing
28 unit. On December 18, 2020, USP Atwater went on lockdown status. On December 21, 2020,

1 Plaintiff was tested a third time, and eight days later was notified he was COVID-19 positive.
2 Plaintiff contends he did not have COVID-19 before his transfer to USP Atwater and his “health
3 status was known.” Plaintiff contends “staff” at USP Atwater “acted negligently by moving [him]
4 into a unit where they did not know any of the inmates status that was prehoused there.” Plaintiff
5 contends the COVID-19 virus “can only come into the prison two ways and all inmates that are
6 incoming are quarantined for 21 days, or more, and required to have two negative test results.”
7 Plaintiff alleges that before December 21, 2020, “none of the inmates were tested for COVID-
8 19.” Because COVID-19 is “a deadly virus,” Plaintiff contends “its not right to not test inmates”
9 and that the “decision was made by the admin. Staff, Warden Ciolli and HAS Hanson.” Plaintiff
10 contends his mental health has deteriorated, he has developed severe insomnia and is depressed.
11 Plaintiff states he is “treated as if [he] has leprosy.” He suffers from ongoing symptoms including
12 the loss of smell and taste, blurry vision, headaches, fatigue and joint pain, and an inability to
13 exercise due to asthma and shortness of breath. Finally, Plaintiff contends his request for an
14 inhaler has been denied.

15 In his second claim for relief, Plaintiff alleges violations of his Fourth and Fourteenth
16 Amendment rights and contends that on or about April 19, 2021, he received legal mail “from the
17 Denver District Court,” clearly marked “to be opened in [his] presence.” Instead, the piece of
18 mail was “opened outside of [his] presence and copied.” He contends he can prove it “to be a
19 fact.” On May 1, 2021, Plaintiff contends legal mail was sent to him from a law firm; it too was
20 clearly marked and was opened prior to his “signing the log.” Plaintiff contends he “made it clear
21 to the officer that this was the second time he has opened [Plaintiff’s] legal mail,” and that
22 Plaintiff intended to file a complaint. Plaintiff asserts the officer then “seized” the envelope and
23 documents and advised Plaintiff that “he had to test them for drugs.” The officer refused to
24 perform the test in Plaintiff’s presence over Plaintiff’s objections. Plaintiff contends he is “sure
25 the results were negative because [he] was never taken to the S.H.U nor has any investigation
26 been conducted.” Plaintiff states he has yet to receive the mail taken from him. Plaintiff contends
27 the “deliberate acts proves how Officer Moses Jimenez violated [his] constitutional rights.” In the
28 “Injury” portion of the form complaint for this claim, Plaintiff states: “I am filing my post-

1 conviction relief motions pro se. I don't know what those legal documents state. I am already
 2 being denied access to state related materials, so I am at a disadvantage. To have my
 3 constitutional rights violated continuously is arbitrary and unfair."

4 In his third claim for relief, Plaintiff alleges violations of his First and Eighth Amendment
 5 rights and contends that on May 1, 2021, after he informed Defendant Jimenez that he would
 6 filing a grievance against him for opening Plaintiff's mail outside of Plaintiff's presence, Jimenez
 7 wrote a disciplinary report for using another inmate's phone "1 hour and 15 minutes prior to our
 8 interaction." Plaintiff contends Jimenez "has his coworkers going over and beyond pat searching
 9 and cell searching" Plaintiff on a regular basis. Before that date, Plaintiff alleges he had "avoided
 10 all confrontations and interactions with all correctional officers" and had not received "any
 11 disciplinary reports since [he] was admitted into federal custody." Plaintiff contends that Jimenez
 12 "was digging for a reason to write" Plaintiff up because Jimenez "was upset" about Plaintiff
 13 intention to file a grievance. Plaintiff contends he is being "harassed by [Jimenez's] coworkers"
 14 who are "racially profiling and discriminating against" him. Plaintiff contends he lives "in fear of
 15 them going a step further and causing" him bodily harm.

16 By way of relief, Plaintiff seeks to be transferred to another institution with "better health
 17 care staff and services," punitive damages in the sum of \$3,000,000 and "all the court costs and
 18 fees paid along with any attorney fees that apply."

19 **IV. DISCUSSION**

20 **1. Plaintiff's First Claim**

21 Plaintiff contends his Eighth Amendment rights were violated by USP Atwater officials
 22 and staffs' failure to protect him from contracting the COVID-19 virus in December of 2020.

23 While the Supreme Court has recognized a *Bivens* remedy in the context of the Eighth
 24 Amendment—*Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment Cruel and Unusual
 25 Punishments Clause for failure to provide adequate medical treatment)—Plaintiff's claim is
 26 different.

27 District courts in the Ninth Circuit and elsewhere have found that *Bivens* Eighth
 28 Amendment claims based on prison officials' alleged failure to protect prisoners from COVID-19

1 arise in a “new context,” and courts have declined to extend *Bivens* to that context. *See, e.g., Stine*
 2 *v. Von Blanckensee*, No. 20-cv-00489, 2020 WL 8024369 at *4 (D. Ariz. Dec. 22, 2020)
 3 (“Although the Supreme Court may have assumed for analytical purposes that a *Bivens* cause of
 4 action exists under the Eighth Amendment for failing to protect an inmate, *see Farmer v.*
 5 *Brennan*, 511 U.S. 825 (1994), it has never specifically concluded that such a cause of action
 6 exists.”) (parallel citations omitted); *Hand v. Young*, No. 20-cv-00784, 2021 WL 3206833 at *3, 6
 7 (E.D. Cal. July 29, 2021) (finding Plaintiff’s Eighth Amendment claims alleging that Defendants
 8 “fail[ed] to evaluate Plaintiff for early release on home confinement which exposed Plaintiff to
 9 the risk of contracting COVID ... present a new *Bivens* context” and “are similar in context to the
 10 claims for which the Supreme Court rejected an expansion of *Bivens* liability in *Abbasi*”), R&R
 11 adopted, 2021 WL 5234429 (E.D. Cal. Nov. 10, 2021); *see also Walker v. United States*, No. 21-
 12 cv-1881, 2022 WL 1472872 at *3-5 (M.D. Pa. May 10, 2022) (finding claim that “Defendants
 13 exhibited deliberate indifference towards [the plaintiff’s] conditions of confinement, causing the
 14 spread of COVID-19 ... presents a new context because” the “Supreme Court has never extended
 15 *Bivens* to claims against federal prison officials regarding conditions of confinement”); *Gater v.*
 16 *Carvajal*, No. 20-cv-00146, 2021 WL 868433 at *1, 3 (E.D. Ark. Feb. 23, 2021) (declining to
 17 recognize *Bivens* claims alleging that “Defendant Correctional Counselor ... failed to protect [the
 18 plaintiff prisoner] from harm and retaliated against him for filing grievances against her by
 19 transferring him” to a different unit “where several inmates had COVID-19 and intended to harm
 20 him”), R&R adopted, 2021 WL 865274 (E.D. Ark. Mar. 8, 2021), summarily aff’d, No. 21-1928,
 21 2021 WL 4959015 (8th Cir. Aug. 4, 2021); *Patino v. Emerson*, No. 20-cv-708, 2020 WL
 22 5417617 at *2 (W.D. Mich. Sept. 10, 2020) (declining to recognize *Bivens* remedy, in part
 23 because plaintiffs were seeking immediate release from detention and therefore could pursue a
 24 habeas claim under 28 U.S.C. § 2241 as an alternative remedy).

25 One court reasoned that the following special factors counseled against extending the
 26 *Bivens* remedy:

27 Plaintiff’s claims implicate[] significant separation of powers
 28 concerns vis-à-vis prison administration and implying a new *Bivens*
 remedy for such claims would undoubtedly impose a large burden on

1 the judiciary and prison officials. ... Significantly, Plaintiff's claim[s]
 2 arise from the prison administration's considerations for early release
 3 and decisions related to effective management of prison populations
 4 in light of the COVID pandemic.

5 *Hand*, 2021 WL 3206833 at *7. Courts have also noted the availability of alternative remedies,
 6 such as seeking injunctive relief or release from custody via a writ of habeas corpus. *See, e.g.*,
 7 *Stine*, 2020 WL 8024369 at *5; *Hand*, 2021 WL 3206833 at *5.

8 The Court should decline to imply a new *Bivens* remedy for Plaintiff's Eighth Amendment
 9 failure to protect from contracting COVID-19 claim. The Court finds special factors merit
 10 hesitation and recommends declining to find implied *Bivens* claims because Congress is better
 11 equipped to create a damages remedy in this new context. *Egbert*, 142 S. Ct. at 1803.
 12 Consequently, Plaintiff has failed to state a cognizable claim. Since this is a deficiency that
 13 cannot be cured by amendment, the Court concludes that granting leave to amend would be futile.

13 **2. Plaintiff's Second Claim**

14 Plaintiff asserts his rights under the "Fourth and Fourteenth Amendments" were violated
 15 by Jimenez's actions concerning Plaintiff's incoming mail in May of 2021.

16 The Court initially notes that Plaintiff's second claim is unrelated to his first claim. A
 17 complaint must comply with the requirements of Federal Rules of Civil Procedure 18 and 20.
 18 Under these rules, a plaintiff may not proceed on a myriad of unrelated claims against different
 19 defendants in a single action. Fed. R. Civ. P. 18(a), 20(a)(2).

20 The controlling principle appears in Fed. R. Civ. P. 18(a): 'A party
 21 asserting a claim to relief as an original claim, counterclaim, cross-
 22 claim, or third party claim, may join, either as independent or as
 23 alternate claims, as many claims, legal, equitable, or maritime, as the
 24 party has against an opposing party.' Thus multiple claims against a
 25 single party are fine, but Claim A against Defendant 1 should not be
 26 joined with unrelated Claim B against Defendant 2. Unrelated claims
 27 against different defendants belong in different suits, not only to
 28 prevent the sort of morass [a multiple claim, multiple defendant] suit
 produce[s], but also to ensure that prisoners pay the required filing
 fees-for the Prison Litigation Reform Act limits to 3 the number of
 frivolous suits or appeals that any prisoner may file without
 prepayment of the required fees. 28 U.S.C. § 1915(g).

K'napp v. California Dept. of Corrections, 2013 WL 5817765, at *2 (E.D. Cal., Oct. 29, 2013),
 aff'd sub nom. *K'napp v. California Dept. of Corrections & Rehabilitation*, 599 Fed. Appx. 791

1 (9th Cir. 2015) (alteration in original) (quoting *George v. Smith*, 507 F.3d 605, 607 (7th Cir.
 2 2007). *See also* Fed. R. Civ. P. 20(a)(2) (“Persons ... may be joined in one action as defendants if:
 3 (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect
 4 to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
 5 (B) any question of law or fact common to all defendants will arise in the action”).

6 Plaintiff’s first claim names “Admin. Staff, Warden Ciolli and HAS Hanson” as
 7 Defendants and relates to actions taken in December 2020. Plaintiff’s second claim names only
 8 Defendant Jimenez and concerns actions taken in May 2021. These claims are not properly
 9 asserted in a single action because the first claim and second claim do not arise from the same
 10 transaction, occurrence, or series of transactions or occurrences, nor is there a question of law or
 11 fact common to all defendants. Therefore, this claim violates Federal Rules of Civil Procedure 18
 12 and 20. Plaintiff may not pursue multiple unrelated actions in one lawsuit.

13 The Court also notes that Plaintiff references the “Fourth and Fourteenth Amendments”¹
 14 in his second claim concerning his incoming mail—a piece of mail from the “Denver District
 15 Court” and a piece of mail from “a law firm.” Plaintiff apparently alleges that his mail was
 16 subject to an illegal search and seizure in violation of the Fourth Amendment when it was opened
 17 by prison personnel outside of his presence. It is well-settled that a prisoner has no reasonable
 18 expectation of privacy in his cell and is not entitled to Fourth Amendment protection against
 19 unreasonable searches and seizures. *See Hudson v. Palmer*, 468 U.S. 517, 527–28 (1984); *Nakao*
 20 *v. Rushen*, 766 F.2d 410, 412 (9th Cir. 1985). This analysis applies equally to an inmate’s
 21

22 ¹ The Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers, and
 23 effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but
 24 upon probable cause, supported by Oath or affirmation, and particularly describing the place to be
 25 searched, and the persons or things to be seized.” The *Bivens* Court implied a private right of action under
 26 the Fourth Amendment for an unreasonable search and seizure claim against FBI agents for handcuffing a
 27 man in his own home without a warrant. *Bivens*, 403 U.S. at 389, 397.

28 Section 1 of the Fourteenth Amendment provides: “All persons born or naturalized in the United States
 29 and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they
 30 reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens
 31 of the United States; nor shall any State deprive any person of life, liberty, or property, without due
 32 process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Plaintiff’s
 33 case does not involve any state action.

1 incoming mail. *See Mitchell v. Dupnik*, 75 F.3d 517, 522 (9th Cir. 1996) (holding that pre-trial
 2 detainee has no reasonable expectation of privacy in cell; no Fourth Amendment violation when
 3 inmate not present during search of legal materials). Thus, the issue of whether a prison official
 4 can open legal materials outside of an inmate's presence is more appropriately considered under
 5 the First Amendment. *See, e.g., Treglia v. Cate*, No. C 11-3438 LHK (PR), 2012 WL 3731774,
 6 *4 (N.D. Cal. Aug. 28, 2012) Insofar as Plaintiff alleges a violation of the Fourth Amendment, he
 7 fails to state a claim because Plaintiff has no reasonable expectation of privacy regarding his
 8 incoming legal mail. The Court will consider Plaintiff's claim in the First Amendment context.

9 Prisoners have "a First Amendment right to send and receive mail." *Witherow v. Paff*, 52
 10 F.3d 264, 265 (9th Cir. 1995) (per curiam); *see also Nordstrom v. Ryan*, 856 F.3d 1265, 1271 (9th
 11 Cir. 2017). Plaintiff is advised that prisoners "have a protected First Amendment interest in
 12 having properly marked legal mail opened only in their presence." *Hayes v. Idaho Corr. Ctr.*, 849
 13 F.3d 1204, 1211 (9th Cir. 2017) (concluding the protected First Amendment interest extends to
 14 civil legal mail). Consistent with the First Amendment, prison officials may, (1) require that mail
 15 from attorneys be identified as such and (2) open such correspondence in the presence of the
 16 prisoner for visual inspection. *See Wolff v. McDonnell*, 418 U.S. 539, 576–77 (1974); *Sherman v.*
 17 *MacDougall*, 656 F.2d 527, 528 (9th Cir. 1981). *Cf. Mann v. Adams*, 846 F.2d 589, 590–91 (9th
 18 Cir. 1988) (per curiam) (concluding that mail from public agencies, public officials, civil rights
 19 groups and news media may be opened outside the prisoners' presence in light of security
 20 concerns). "Mail from the courts, as contrasted to mail from a prisoner's lawyer, is not legal
 21 mail." *Keenan v. Hall*, 83 F.3d 1083, 1094 (9th Cir. 1996), amended by 135 F.3d 1318 (9th Cir.
 22 1998); *see also Hayes*, 849 F.3d at 1211 (explaining the First Amendment does not prohibit
 23 opening mail from the courts outside the recipient's presence). A prison need not treat all mail
 24 sent to government agencies and officials as legal mail. *See O'Keefe v. Van Boeing*, 82 F.3d 322,
 25 326 (9th Cir. 1996). Plaintiff's mail from the "Denver District Court" is not legal mail. *Keenan*,
 26 83 F.3d at 1094. Plaintiff's mail from "a law firm" is legal mail. *Wolff*, 418 U.S. at 576-77.

27 As noted above, the Supreme Court has only recognized a *Bivens* remedy in the context of
 28 the Fourth, Fifth, and Eighth Amendments. *See Bivens*, 403 U.S. 388 (Fourth Amendment

1 prohibition against unreasonable searches and seizures); *Davis*, 442 U.S. 228 (Fifth Amendment
2 gender-discrimination); *Carlson*, 446 U.S. 14 (Eighth Amendment Cruel and Unusual
3 Punishments Clause for failure to provide adequate medical treatment). The Supreme Court has
4 not recognized a *Bivens* remedy in the context of the First Amendment. The Ninth Circuit has
5 also refused to extend a *Bivens* remedy to a claim under the First Amendment. *Reichle v.*
6 *Howards*, 566 U.S. 658, 663 n.4 (2012) (citing *Iqbal*, 556 U.S. at 675; *Bush v. Lucas*, 462 U.S.
7 367, 368 (1983)).

8 The Court finds that the “special factors” analysis required by *Abassi* counsels against
9 extending *Bivens* into this area. Plaintiff has available to him the BOP’s grievance process in an
10 effort to resolve the claims raised in the complaint. The Court declines to extend a *Bivens* cause
11 of action to Plaintiff’s First Amendment legal mail claim. *See Buenrostro v. Fajardo*, 770 F.
12 App’x 807, 808 (9th Cir. 2019) (declining to extend *Bivens* cause of action for First Amendment
13 retaliation claim); *Lee v. Matevousian*, 1:18-cv-00169-GSA-PC, 2018 WL 5603593, at *4 (E.D.
14 Cal. Oct. 26, 2018) (declining to find implied *Bivens* cause of action for First Amendment
15 retaliation and denial of access to court claims); *see also Railey v. Ebbert*, 407 F. Supp. 3d 510,
16 522 (M.D. Pa. 2019) (“[A]s other courts have recognized, special factors exist counseling against
17 the expansion of *Bivens* to First Amendment claims regarding interference with mail, such as
18 Congress’ decision to not provide a damages remedy for certain violations and the financial
19 burden on federal agencies resulting from litigation”); *Sharp v. Numsen*, 2022 WL 834421, at *4-
20 9 (W.D. Wis. Mar. 21, 2022) (declining to extend *Bivens* to a First Amendment claim concerning
21 alleged screening of inmate’s mail); *Smadi v. True*, 2021 WL 2853262, at *3-7 (S.D. Ill. July 8,
22 2021) (same).

23 The Court should decline to imply a new *Bivens* remedy for Plaintiff’s First Amendment
24 legal mail claim. The Court finds special factors counsel hesitation because Congress is better
25 equipped to create a damages remedy in this new context and recommends declining to find
26 implied *Bivens* claims. Consequently, Plaintiff has failed to state a cognizable claim. Since this
27 deficiency cannot be cured by amendment, the Court concludes that granting leave to amend
28 would be futile.

3. Plaintiff's Third Claim

2 Plaintiff contends Jimenez retaliated against him for filing a grievance regarding
3 Jimenez's treatment of Plaintiff's incoming mail by filing a false disciplinary report in May 2021.
4 This claim too is unrelated to Plaintiff's first claim.

5 For the reasons set forth above—the claims do not arise from the same transaction,
6 occurrence, or series of transactions or occurrences, nor is there a question of law or fact common
7 to all defendants—the Court finds this claim violates Federal Rules of Civil Procedure 18 and 20.
8 For the reasons given below, the Court will recommend the claim be dismissed on another basis.

9 The Supreme Court has not recognized a *Bivens* remedy under the First Amendment and
10 the Ninth Circuit has also refused to extend a *Bivens* remedy to a claim under the First
11 Amendment. *Reichle v. Howards*, 566 U.S. at 663 n.4 (citing *Iqbal*, 556 U.S. at 675; *Bush v.*
12 *Lucas*, 462 U.S. 367, 368 (1983)); *see also Baptiste v. Zunkeir*, No. 5:19-cv-00025-VBF-JDE,
13 2019 WL 4543113, at *4-5 (C.D. Cal. Apr. 1, 2019) (declining to find an implied *Bivens* cause of
14 action for a First Amendment retaliation claim).

15 The Court finds that the “special factors” analysis required by *Abassi* counsels against
16 extending *Bivens* into this area. Plaintiff has available to him the BOP’s grievance process to
17 resolve the claims raised in the complaint. The Court declines to extend a *Bivens* cause of action
18 to Plaintiff’s First Amendment retaliation claim. *See Buenrostro v. Fajardo*, 770 F. App’x at 808
19 (declining to extend *Bivens* cause of action for First Amendment retaliation claim); *Lee v.*
20 *Matevoussian*, 2018 WL 5603593, at *4 (declining to find implied *Bivens* cause of action for First
21 Amendment retaliation and denial of access to court claims).

22 The Court should decline to imply a new *Bivens* remedy for Plaintiff's First Amendment
23 retaliation claim. The Court finds special factors counsel hesitation because Congress is better
24 suited to create a damages remedy in this new context and recommends declining to find implied
25 *Bivens* claims. Consequently, Plaintiff has failed to state a cognizable claim. Since this is a
26 deficiency that cannot be cured by amendment, the Court concludes that granting leave to amend
27 would be futile.

28 //

V. ORDER AND RECOMMENDATIONS

Based on the foregoing, **IT IS HEREBY ORDERED** that the Clerk of the Court randomly assign a district judge to this action.

Further, **IT IS HEREBY RECOMMENDED** that Plaintiff's complaint be dismissed without leave to amend for failure to state a claim.

These Findings and Recommendations will be submitted to the district judge assigned to this case, pursuant to 28 U.S.C. § 636(b)(1). **Within 14 days** of the date of service of these Findings and Recommendations, a party may file written objections with the Court. The document should be captioned, “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the specified time may result in waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: December 6, 2022

/s/ Sheila K. Oberto

UNITED STATES MAGISTRATE JUDGE